Cayman Developments (K) Sdn Bhd v Mohd Saad bin Long & Ors

HIGH COURT (ALOR SETAR) — CIVIL APPEAL NO 12–02–96 OF 1999
MOHD HISHAMUDIN J
18 JULY 1996

Land Law *— Housing developers — Sale and purchase agreement — Whether state authority empowered to impose requirement in sale and purchase agreement — National Land Code 1965 s 124(5)(c)*

At first instance, the sessions court judge had allowed the respondents' claim against the appellant for breach of a requirement imposed by the state authority when approving an application for the conversion of a piece of land. The state authority had approved the conversion on the condition that each unit of the low-cost houses sold to the public had to be sold at a discount of 5% off the selling price. The appellant, however, sold those houses without discount. The appellant appealed against the decision of the sessions court judge. The issue on appeal was whether s 124(5)(c) of the National Land Code 1965 ('the Code') empowered the state authority to require the appellant to sell to the public, each unit of the low-cost houses at a discount of 5% off the selling price.

Held, allowing the appeal:

The state authority had no power under s 124(5)(c) of the Code to impose such a requirement. The state authority, being a regulatory body on matters pertaining to land, should avoid entering into the commercial arena but should only confine itself to matters directly pertaining to the usage of land and the imposition of rent and premium consequential to the conversion of land. The rights and obligations of the parties should be confined only to the terms of the sale and purchase agreement (see pp 664D–E, 666B–C, 665A–B).

[Bahasa Malaysia summary

Pada mulanya, hakim mahkamah sesyen telah membenarkan tuntutan responden-responden terhadap perayu kerana keingkaran syarat yang dikenakan oleh pihak berkuasa negeri ketika meluluskan suatu permohonan untuk penukaran sebidang tanah. Pihak berkuasa negeri telah meluluskan penukaran tersebut dengan syarat bahawa setiap unit rumah kos rendah yang dijual kepada orang awam haruslah dijual dengan diskaun 5% dari harga jualan. Perayu walaubagaimanapun telah menjual rumah-rumah itu tanpa diskaun. Perayu telah merayu terhadap keputusan hakim mahkamah sesyen. Isu rayuan adalah sama ada s 124(5)(c) Kanun Tanah Negara 1965 ('Kanun tersebut') memberi kuasa kepada pihak berkuasa negeri untuk mempersyaratkan perayu menjual kepada orang awam, setiap satu unit rumah-rumah kos rendah tersebut dengan diskaun 5% dari harga jualan.

Diputuskan, membenarkan rayuan tersebut:

Pihak berkuasa negeri tidak mempunyai kuasa di bawah s 124(5)(c) Kanun tersebut untuk mengenakan syarat yang sedemikian. Pihak Berkuasa Negeri, yang merupakan sebuah badan regulatori berhubung dengan perkara-perkara yang berkaitan dengan tanah, seharusnya mengelak dari memasuki arena komersyial tetapi haruslah menetapkan dirinya pada perkara-perkara yang secara langsung berkaitan dengan penggunaan tanah dan pengenaan sewaan serta premium bersampingan dengan penukaran tanah. Hak dan kewajipan pihak-pihak tersebut haruslah hanya ditetapkan kepada terma-terma perjanjian jualbeli (lihat ms 664D–E, 666B–C, 665A–B).]

Notes

For cases on housing developers generally, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 2073–2114.

Cases referred to

Barnard v National Dock Labour Board [1953] 1 All ER 1113 (refd)
Birmingham (Churchwardens and Overseers) v Shaw (refd)
Eu Finance Bhd v Lim Yoke Foo [1982] 2 MLJ 37 (refd)
Pengarah Tanah dan Galian, Wilayah Perseketuan v Sri Rempah Enterprise Sdn Bhd [1979] 1 MLJ 135 (refd)
Ridge v Baldwin [1963] 2 All ER 66 (refd)

Legislation referred to

Kedah Enactment No 63 (Malay Reservations) s 6
National Land Code 1965 s 124(5)(c)

A Nadarajan (*A Nadarajan & Co*) for the appellant.
Manjit Singh (*Manjit Singh & Co*) for the respondent.

Mohd Hishamudin J: This is an appeal by the appellant company, Cayman Developments (K) Sdn Bhd ('Cayman'), against the decision of the learned sessions court judge, Alor Setar, given on 17 January 1996. In her judgment, the learned sessions court judge had allowed the respondents' (the plaintiffs before the lower court) claim against Cayman for breach of a requirement imposed by the state authority on the company when approving an application for the conversion of a piece of land.

It is necessary to set out the background in some detail in order to appreciate the issues. Cayman is a housing developer. It was desirous of developing a piece of land in the mukim of Alor Merah, Alor Setar, into a low-cost housing scheme.

The land did not belong to the defendant. It belonged to a Malay lady by the name of Supiah bte Yahaya. She was the registered owner. The land

A is a Malay reservation land. Under s 6 of the Kedah Enactment No 63 (Malay Reservations), the land could only be sold to a Malay or a Siamese.

Now, Cayman was not in the picture initially. At the early stage, there was a company known as 'Syed Omar Al-Bukhary Sdn Bhd' ('Al-Bukhary'). Al-Bukhary was interested in developing the land into a low-cost housing scheme. But under the National Land Code 1965 ('the Code'), the land, in terms of land use, came under the category of 'agricultural/padi land'. Thus, legally, it could not be used for the purpose of a housing scheme, unless converted in accordance with the relevant provisions of the Code to the category of 'residential' and 'commercial'. So, with the agreement of the registered proprietor, Supiah, Al-Bukhary applied to the state authority of Kedah for the conversion of land use. The company succeeded in its application. The approval letter, dated 29 February 1988 and issued by the office of the State Secretary on behalf of the state authority, was tendered at the trial before the lower court — as exh P3.

What is significant for the purpose of the present case is that the state authority of Kedah, in giving the approval, also imposed a requirement. The requirement was that the low-cost houses to be built on the land were to be sold to the public at a discount of 5% of the price of RM25,000. The requirement (which eventually became the subject matter of the suit) reads as follows:

> Menjual rumah-rumah yang dibina dengan harga kurang 5% daripada $25,000 ($23,750).

Al-Bukhary, having obtained the approval, however, found itself unable to complete the project. The reason is not stated in the evidence. Al-Bukhary invited Cayman to take over the project. Cayman accepted the invitation (it appears from the evidence that, after the taking over by Cayman, Al-Bukhary did not drop out completely from the picture and that there was some sort of a joint-venture agreement between these two entities). By a letter dated 10 November 1988 (see exh P4), Cayman formally informed the state authority of the taking over.

Cayman, as the new owner of the project, duly advertised the sale of the low-cost houses. Responding to the advertisement, each of the respondents purchased a unit of the low-cost houses.

A standard sale and purchase agreement was entered into by each of the buyers. It is a tripartite agreement, the three parties being:

(1) the purchaser of the relevant unit;

(2) Cayman, as the developer/vendor of the low cost housing scheme — Taman Damai; and

(3) Supiah — the registered owner of the land.

It is significant to note that in the agreement the price of each unit of low-cost house is stated as RM25,000. There is no mention of any discount whatsoever in the agreement.

Apart from the first respondent/plaintiff (Mohd Saad), there were 72 other purchasers of units and each of them signed a similarly worded tripartite agreement, with Cayman and Supiah being the other two parties.

At the time of entering into the tripartite sale and purchase agreement, none of the 73 buyers (the respondents) had any knowledge of the requirement (as to the 5% discount) imposed by the state authority on Al-Bukhary and its successor, Cayman, as to the price of each unit.

Some time later, however, the respondents came to know about the requirement imposed on Cayman. The respondents were unhappy. Although not stated explicitly, they seem to imply from their evidence that they felt somewhat cheated. From their standpoint, because of the requirement imposed on Cayman by the state authority, the company should have sold the units to them at a 5% discount, that is to say, the price per unit should have been only RM23,750, and not RM25,000. They believe that they have a legal right to the discount. The respondents, therefore, demanded a refund of 5% from Cayman, but the latter refused to accede to the demand. They, therefore, filed a civil suit before the sessions court claiming a refund of the discount. At the sessions court they succeeded in their claim.

The defendant (Cayman, the appellant) now appeals to this court.

In a civil action, in order for a plaintiff to succeed, he must prove his case on a balance of probabilities. He must prove the allegations and claims as set out in the statement of claim. At the trial, it is incumbent upon the plaintiff to adduce credible evidence that supports his claims and allegations. He cannot adduce evidence that is inconsistent or contradicts his averments in the statement of claim.

In the present case, however, it is my observation that the statement of claim is not supported by evidence. In the statement of claim it is stated (at para 4) that the decision of the State Executive Council was made on 13 August 1988. However, in the evidence adduced in the form of a letter by the office of the State Secretary (P3), it is stated that the decision was made on 13 January 1988. Next, in the statement of claim, it is averred (in paras 5, 6, 7 and 8) that the houses were offered for sale to both Bumiputras and non-Bumiputras. However, in the evidence it is stated that the entire units were to be sold to Malays only. It is clearly stated in P3:

> Permohonan ini diluluskan mengikut pelan tataletak No 2/82/P1A dan sebanyak 100% daripada plot-plot di dalam tataletak tersebut hendaklah diperuntukkan kepada orang Melayu.

Indeed, the first plaintiff, in his evidence, conceded that the land is a Malay Reservation land. Any sale of such land to a non-Malay is prohibited by s 6 of the Kedah Enactment No 63 (Malay Reservations).

Again, in the statement of claim, it is alleged (in para 5) that the state authority had laid out the following condition:

> Salah satu syarat yang Majlis Mesyuarat meletakkan sewaktu luluskan projek tersebut adalah seperti berikut:
> Menjual kepada Bumiputra dengan harga 5% kurang daripada harga jualan kepada bukan Bumiputra.

But in the documentary evidence, P3, the requirement is stated differently as follows (to repeat what has been said earlier):

A Menjual rumah-rumah yang dibina dengan harga kurang 5% daripada $25,000 ($23,750).

Indeed, in the approval letter nothing at all is mentioned about non-Bumiputra.

Now, on the basis of the above considerations alone, it is sufficient for
B me to allow this appeal.

However, to my mind, there is also another ground as to why I should allow this appeal. It appears from the statement of claim and the evidence that the plaintiffs/respondents are not alleging any breach of contract or the commission of a tort by Cayman. Nor are they relying on the law of
C restitution or the Specific Relief Act. Mr Manjit Singh, for the plaintiffs/ respondents, put forth the basis of his clients' claim in the following manner. First, he contends that the state authority has the power to impose the requirement as to the discount of 5% under s 124 of the Code. Second, he contends that Cayman, by not giving the discount, had breached that requirement. Third, he contends that because of this breach, the respondents/
D plaintiffs have the legal right to claim the discount of 5% from the defendant. In short, the foundation of the claim is not a breach of the sale and purchase agreement or the commission of any tort. Nor is it said that the cause of action was founded on the law of restitution or based on any provision of the Specific Relief Act. Rather, the foundation of the claim appears to be the breach of the requirement imposed by the state authority on the vendor/
E developer, that is, Cayman, purportedly under s 124 of the Code.

The relevant parts of s 124 of the Code read:

> Power of state authority to vary conditions, etc., on application of proprietor
>
> (1) The proprietor of any alienated land may apply to the state authority under this section for —
>
F (a) the alteration of any category of land use to which the land is for the time being subject ...
>
> ...
>
> (2) Where the state authority approves any application under para (a) of sub-s (1)
>
G (a) it shall direct that the category of land used specified in the application be endorsed on the document of title to the land, and the existing category (if any) deleted, and ...
>
> ...
>
> (5) Any direction given by the state authority under this section may be made conditional upon all or any of the following matters —
>
H (a) the payment of a further premium;
>
> (aa) the payment of any other charges as may be prescribed;
>
> (b) the reservation of a new rent;
>
> (c) *compliance with such other requirements as the state authority may think*
I *fit.* (Emphasis added.)

Clearly Mr Manjit Singh must have relied on sub-s (5)(c) that I have just cited.

In the light of the approach adopted by Mr Manjit, the question thus arises as to whether under s 124 of the Code, the state authority of Kedah, in approving the application for conversion, has the power to require Cayman to sell to the public each unit of the low-cost houses at a discount of 5% of the price of RM25,000.

In my judgment, the state authority has no power under sub-s (5)(c) of the Code to impose the requirement that I have mentioned on Al-Bukhary and Cayman when approving the application for conversion of land use of the land in question. The requirements regarding the price of each of the units to be sold to the public as well as the discount of 5% are not the kind of requirements envisaged by sub-s (5)(c) of the Code. In other words, the requirements are not within the powers of the state authority to impose under that provision.

I have no doubt whatsoever of the good intention of the state authority, and that in prescribing the price and the discount, it certainly had in mind the interest of the low income section of the general public, who would constitute the potential buyers of the low-cost units. Yet, with the greatest respect, I do not think that Parliament, in enacting sub-s (5)(c), had in mind to confer on the state authority such a wide power so as to empower it to even fix the price of the low-cost units for the purpose of sale to potential buyers, let alone to prescribe any discount. In other words, the state authority, acting under s 124(5)(c) of the Code, has no power or jurisdiction to impose requirements of such nature. The requirements imposed are, in my judgment, ultra vires. This being the case, Cayman was not obliged to comply with such requirements. The company may ignore them, as it rightly did in the present case. The principle is clearly laid down in *Eu Finance Bhd v Lim York Foo* [1982] 2 MLJ 37. In the case cited, the Federal Court held (p 39):

> The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings: it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon — in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent. In *Harkness v Bell's Asbestos and Engineering Ltd*, Lord Diplock L J (now a Law Lord) said (at p 736) that; 'it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside'.

Where a decision is null by reason of want of jurisdiction, it cannot be cured in any appellate proceedings; failure to take advantage of this somewhat futile remedy does not affect the nullity inherent in the challenged decision. The party affected by the decision may appeal 'but he is not bound to (do so), because he is at liberty to treat the act as *void*' (*Birmingham (Churchwardens and Overseers) v Shaw* (at p 880 per Denman CJ)). In *Barnard v National Dock Labour Board* it was said that, as a notice of suspension made by the local board was a nullity, 'the fact that there was an unsuccessful appeal on it cannot turn that which was a nullity into an effective suspension' (at p 34 per Singleton LJ). *Ridge v Baldwin* is to the same effect.

Since Cayman (and Al-Bukhary too) was not obliged to comply with the requirements as to the price and discount, therefore, it was under no legal obligation to make any refund to the respondents. The rights and obligations of the parties as to the sale price should be confined only to the terms of the sale and purchase agreement (it is not suggested by Mr Manjit Singh that the requirements should be an implied term of the agreement).

Mr Manjit, however, submits that the requirements imposed are reasonable and as such are not ultra vires. He relies on *Pengarah Tanah dan Galian, Wilayah Perseketuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135. In that case, Suffian LP delivering the judgment of the Federal Court enunciated the following principles:

1 The approving authority does not have an uncontrolled discretion to impose whatever conditions it likes.

2 The conditions, to be valid, must fairly and reasonably relate to the permitted development.

3 The approving authority must act reasonably and planning conditions must be reasonable.

4 The approving authority is not at liberty to use its power for an ulterior object; however desirable that object may seem to it in the public interest.

The above case, like the present case, involves the interpretation of sub-s (5)(c) of s 124 of the Code. However, there the facts were different. In that case it was not about a low-cost housing project; nor was the requirement imposed by the authority in question in the nature of price fixing of houses. In that case, the requirement imposed on the proprietor company for the approval under s 124 of the Code was that it should surrender to the authority its perpetuity title and, in return, would be issued with a 99-year lease. This requirement was held by the Federal Court to be unreasonable and irrelevant to the permitted development. In my opinion, whatever that was said or general principles enunciated by Suffian LP in *Sri Lempah*, must be understood in the context of the facts of that case.

Yet, even if the principles in *Sri Lempah* do apply to the case before me, it is important to appreciate that the test laid down by the Federal Court is that the condition or requirement 'must fairly and reasonably relate to the permitted development'. The words 'relate to the permitted development' must be fully understood and one must avoid giving them a far-fetched interpretation. In the context of the present case, the permitted development is the building of low-cost houses on the converted land. Hence the requirement, whatever is the nature, must relate to the building of the low-cost houses (besides the requirement being fair and reasonable).

In my judgment, whether it was fair and reasonable for the state authority to fix the sale price and the discount is a debatable point. However, even assuming that the fixing of the price and the discount by the state authority can be considered fair and reasonable, still I do not think that the requirements imposed can be said to relate to the building of the low-cost houses on the converted land. I so hold because, in my view, the fixing

of the selling price and the discount by the Kedah state authority are acts that have nothing to do with either land use, or the imposition of premium or rent pursuant to the conversion. The nature of the requirements as imposed by the state authority on Cayman relates more to the sale of the low-cost units built on the land. Such requirements, as imposed, are commercial in nature. The state authority, being a regulatory body on matters pertaining to land, in determining the nature of the requirements to impose (if any) when approving a conversion, should avoid entering into the commercial arena; instead, it should only confine itself to matters directly pertaining to the usage of the land and the imposition of rent and premium (consequential to the conversion). I believe this is the spirit behind s 124 of the Code.

Accordingly, this appeal is allowed with costs.

Appeal allowed.

Reported by Andrew Christopher Simon